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No. 87-5259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

vs.

**MICHAEL LANE, Director,
Department of Corrections, et al.,**

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether application of the representative cross-section principle to the petit jury so as to restrict the use of peremptory challenges is unworkable and unsound?

2. For purposes of the retroactivity doctrine, should the date of the announcement of a new rule of constitutional law be the controlling event, rather than some preceeding event, and is the retroactive application of the rule of *Batson v. Kentucky* to cases in which the conviction became final before the decision unwarranted?

3. Is petitioner barred by procedural default from pressing his argument that a violation of *Swain v. Alabama* is shown on the record in this case, and if not, does *Swain* permit the use of peremptory challenges to excuse members of a cognizable racial group for trial-related reasons in an individual case where the defendant is a member of the group?

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution
Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution
Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On the evening of February 5, 1977, petitioner entered an A & P supermarket in Oak Park, Illinois, armed with a pistol, and committed a robbery. As he left the store, he was confronted by two police officers who were responding to a radio broadcast reporting an armed robbery in progress. One of the officers identified himself and

ordered petitioner to halt. Petitioner drew a gun and fired at the officers, and then fled. Both officers chased petitioner on foot. Shots were exchanged, and petitioner wounded one of the officers in the leg. He was eventually apprehended by a third officer responding to the call. *People v. Teague*, 108 Ill. App. 3d 891, 439 N.E.2d 1066, 1073 (1st Dist. 1982), *cert. denied*, 464 U.S. 867 (1983).

Petitioner's insanity defense was unsuccessful, and he was convicted of armed robbery and attempted murder. The trial court sentenced him to concurrent terms of 30 years. 439 N.E.2d at 1068.

On direct appeal, petitioner raised, among others, a claim that the prosecutor's use of peremptory challenges to excuse ten black prospective jurors, with the result that no blacks were on the jury that tried the case, violated his rights to due process and a jury representative of the community under the Sixth and Fourteenth Amendments to the federal Constitution. Relying on its own prior determination that the Sixth Amendment cross-section requirement does not apply at the petit jury stage, the appellate court rejected this claim. 439 N.E.2d at 1069-71.

Petit jury selection procedures in Illinois are governed by statute and by Supreme Court Rules. In all criminal cases, a jury of twelve must be selected, *Ill. Rev. Stat.* 1977, ch. 38, §115-4(b), and the jurors are examined and passed upon in panels of four, with the prosecution using its challenges first and the parties alternating thereafter. Supreme Court Rule 434(a). In a case such as this one, where imprisonment is a possible penalty, each side is allowed ten peremptory challenges. *Ill. Rev. Stat.* 1977, ch. 38, par. 115-4(e). Pursuant to Supreme Court Rule 234, the trial court elected in this case to conduct the voir dire examination himself. (R. Supp., 3)

During the course of jury selection, defense counsel moved for a mistrial on the ground that the prosecutor had used each of his first six peremptory challenges to excuse black jurors. The motion was denied at the time, but it was renewed at the conclusion of jury selection, when defense counsel alleged that all ten of the prosecutor's peremptory challenges had been used to excuse black jurors. In response to the motion, the prosecutor explained that he used his challenges to excuse younger members of the venire, and to obtain a balance of men and women. The motion was again denied. (J.A. 2-4)

On review of petitioner's application for a writ of habeas corpus, a divided en banc Court of Appeals held that (1) the cross-section requirement of the Sixth Amendment afforded no basis for granting relief because it does not apply at the petit jury selection stage so as to restrict the use of peremptory challenges; (2) *Batson v. Kentucky*, 476 U.S. 79 (1986), which was decided after petitioner's conviction became final, does not apply retroactively to cases on collateral review; and (3) that review of petitioner's argument concerning the applicability of *Swain v. Alabama*, 380 U.S. 202 (1965) to his case was barred by procedural default and was without merit. (J.A. 14-53) On March 7, 1988, certiorari was granted to review all three determinations. (J.A. 54)

SUMMARY OF ARGUMENT

I. Thirteen years ago, this Court held in *Taylor v. Louisiana*, 419 U.S. 522 (1975) that the Sixth Amendment right to trial by jury includes the right to a jury selected from a representative cross-section of the community. Three times since then, this Court has been asked to ex-

tend the cross-section requirement to the petit jury so as to impose restrictions on the use of for-cause or peremptory challenges, and three times it has refused, stating in *Lockhart v. McCree*, 476 U.S. 162 (1986) that such an extension would be unworkable and unsound. Petitioner argues that adoption of such an extension follows from what this Court has said about the purpose of the requirement and its relation to the purpose of the jury. This argument ignores the significant difference between the process of selecting prospective jurors for all cases and the process of selecting petit jurors to try a particular case. Moreover, extension of the cross-section requirement would destroy the value of the peremptory challenge and seriously undermine the ability of both the prosecution and the defense to select fair and impartial jurors. Finally, such an extension is unworkable because the standard petitioner proposes for enforcing the cross-section requirement at the petit jury stage does not promote the principle he invokes.

A. In the first two steps involved in selecting a petit jury, establishing a pool of eligible persons and drawing a venire, the selection criteria are general. Minimal qualification is all that is required. In the next two steps, the exercise of for-cause and peremptory challenges after voir dire examination, the criteria are very specific, because the ability of prospective jurors to be impartial in the context of a specific case is being evaluated. While this Court has long recognized the value of broad-based community involvement in the grand and petit jury system, it has never required that the diversity of the community be reflected beyond the pool and venire stages, and has been careful to emphasize that the cross-section principle provides no right to a petit jury of any particular composition. However, following *Taylor*, some state and federal jurisdictions have held, largely in reliance on this Court's

decisions, that the cross-section principle must be applied at the petit jury stage in order for it to be effectuated, and that the use of peremptory challenges must be restricted accordingly. Many more state and federal jurisdictions have rejected this approach. The cross-section requirement serves its purpose at the pool and venire stages by insuring that no distinctive group can be declared *a priori* unfit for jury service. Thus, no group may be officially branded as inferior, and the jury, as an institution, is not made the organ of a special class. Furthermore, the requirement that jury pools be representative and venires drawn at random insures that the composition of the venire cannot be known before the decision to charge an offense is made, and thus the cross-section requirement serves to discourage the corrupt or overzealous prosecutor from bringing unfounded charges. Petitioner's argument that the prophylactic purpose of the jury is thwarted by the peremptory excusal of members of a distinctive group just as if the group had been excluded from the venire is an argument that affirmative steps must be taken to produce cross-sectional petit juries, something this Court has often said is an impossible and undesirable goal. Moreover, this Court's decisions do not support the argument that any procedure, at any stage of the selection process, which may detract from the possibility provided by the random draw of obtaining a cross-sectional jury violates the Sixth Amendment. Rather, this Court has acknowledged that cross-sectional values, while important, are not always paramount. The impact extension of the cross-section requirement would have on the peremptory challenge, and on the overall fairness of the jury system, must therefore be considered.

B. If the cross-section requirement is extended to the petit jury, it must be assumed that the considerations which define a cognizable group would be the same as

when the composition of the pool or venire is examined, because any arbitrary limitation on what groups may be considered cognizable is inconsistent with the principle. Cognizability is a question of fact, depending on sufficient numbers and distinctiveness of the members of a group at a given place and time, and thus the types of groups which may be cognizable is potentially limitless, and the determination of cognizability may require an extensive evidentiary hearing. Also, if extension of the cross-section requirement is necessary to insure a jury which is fair and satisfies the appearance of fairness, then the use of peremptory challenges by the defense must also be restricted because both sides are entitled to a fair trial. Extension of the cross-section requirement would therefore limit the use of peremptory challenges to an infinitely greater degree than does the Equal Protection Clause as construed in *Batson v. Kentucky*, 476 U.S. 79 (1986). It would prohibit their use, by both sides, for all but frivolous reasons or the most palpable manifestations of individual bias, and this is inconsistent with this Court's recognition in *Batson* of the important role played by the peremptory challenge. The challenge permits the elimination of extremes of partiality at both ends of the spectrum, and whenever group membership correlates with partiality for purposes of the issues involved in a particular case, the challenges of one side or the other will be directed at that group to some degree. In such a case, the peremptory challenge promotes impartiality, the core guarantee of the Sixth Amendment, while rigid adherence to cross-sectionalism dissipates impartiality. Extension of the cross-section requirement would therefore destroy the value of the peremptory challenge and detract from jury impartiality.

C. The standard proposed by petitioner for enforcing the cross-section requirement at the petit jury stage is

not only significantly different from the standard proposed by *amicus*, both differ from the standard used in the jurisdictions that have adopted the extension argument. None of these standards promotes the cross-section principle. Petitioner proposes that a prima facie case can be established by showing that (1) the excluded group is a cognizable group; (2) representation of the group on the petit jury is not fair in relation to its numbers in the community; and (3) the underrepresentation is due to the prosecutor's use of peremptory challenges. The inclusion of a proportionality element in this standard means one of two things. Either group-based peremptory challenges are permissible once proportional representation is achieved, in which case the fundamental premise of the extension argument as set forth in the cases which adopt it is false; or the real aim of petitioner's position is to acquire a right to a jury of a particular composition, consisting of a proportionate number of jurors who are members of one or more groups he deems partial to him. The standard proposed by *amicus* similarly focuses on proportionality, but seeks comparison of the percentage of group members left on the venire after the prosecutor's challenges with their proportion in the community, and does not propose examination of the petit jury at any point. Thus, much litigation could take place over the use of challenges even though the group in question is overrepresented on the petit jury. The standard used in other jurisdictions does not contain a proportionality element, and its purpose is to eliminate all group-based peremptory challenges. However, this leads to reversal of convictions in the name of cross-sectionalism even if the jury actually chosen is a perfect mirror of the community.

II. Petitioner's argument that retroactive application of *Batson v. Kentucky*, 476 U.S. 79 (1986) should be determined as of the time of the denial of certiorari in *McCray*

v. New York, 461 U.S. 961 (1983), or alternatively, that all new constitutional rules should be fully retroactive, is insupportable under any of the views on retroactivity expressed by this Court.

A. The denial of certiorari in *McCray* did not foreshadow the result in *Batson* because the opinion respecting the denial of certiorari and the dissenting opinion discuss the developments in Sixth Amendment jurisprudence following *Swain v. Alabama*, 380 U.S. 202 (1965), but *Batson* was decided on equal protection grounds. By the same token, the opinions in *McCray* did not destroy the precedential effect of *Swain*, and even those courts that accepted the invitation extended in *McCray* to serve as laboratories did not dispute that *Swain* remained the dominant equal protection precedent. To suggest that *McCray* had the impact petitioner attributes to it for retroactivity purposes is to suggest that the opinions accompanying the denial of certiorari establish a more significant watershed in constitutional law than a subsequent decision expressly overruling a prior precedent. Moreover, petitioner's argument that a third category of cases should be created for purposes of *Batson* retroactivity, consisting of cases in which the conviction became final after *McCray* but before *Batson*, is unsound. This argument seeks to attribute to *McCray* a significance which, although not decisive, should nevertheless have some impact on the question of retroactivity. No reason is given as to why this should be so.

B. The present debate on the doctrine of retroactivity is between two competing theories: Justice Harlan's view that all new rules of constitutional law should be retroactively applied to all non-final cases at the time of the decision, but, with two narrow exceptions, not to cases on collateral review; and the view that the three-part test of *Linkletter v. Walker*, 381 U.S. 618 (1965) should apply.

Under either approach, retroactive application of *Batson* to cases on collateral review at the time of the decision is unwarranted. Petitioner's contention that new rules of constitutional law should be fully retroactive is not supported by any decision of this Court.

III. Consideration of petitioner's claim that the record supports a finding of error under *Swain v. Alabama*, 380 U.S. 202 (1965) is barred by procedural default, and is without merit.

A. Petitioner did not raise an equal protection argument in state court. He argued for extension of the cross-section requirement under either state or federal constitutional principles, and cited *Swain* only to distinguish its constitutional basis from the one he intended to invoke. The appellate court did not rely on *Swain* as dispositive of the claim, it relied on its own prior decision declining to extend the cross-section requirement. On habeas review, petitioner's claim was of the same character as the one presented in state court, and it was not until after the decision in *Batson v. Kentucky*, 476 U.S. 79 (1986) that he clearly stated an intent to invoke the Equal Protection Clause. Respondents promptly objected on procedural default grounds, and the Court of Appeals held the claim defaulted.

B. The predominant view of *Swain* is that it permits counsel to take the group affiliation of prospective jurors into account when exercising peremptory challenges, if they believe that group affiliation is a trial-related reason for excusal. A fair construction of *Swain* supports this view.

ARGUMENT

I.

APPLICATION OF THE REPRESENTATIVE CROSS-SECTION PRINCIPLE TO THE PETIT JURY SO AS TO RESTRICT THE USE OF PEREMPTORY CHALLENGES IS UNWORKABLE AND UNSOUND.

Three times since *Taylor v. Louisiana*, 419 U.S. 522 (1975) held that the Sixth Amendment right to trial by jury included the right to "selection of a petit jury from a representative cross section of the community", *id.* at 528, this Court has been asked to extend the cross-section requirement so as to impose restrictions on a prosecutor's for-cause or peremptory challenges, and three times it has declined to do so. *Buchanan v. Kentucky*, 107 S.Ct. 2906, 2913 (1987); *Lockhart v. McCree*, 476 U.S. 162, 174 (1986); *Batson v. Kentucky*, 476 U.S. 79, 84, n. 4 (1986). In *McCree*, this Court said:

> . . . we do not believe that the fair cross-section requirement can, or should, be applied as broadly as [the Court of Appeals] attempted to apply it. We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. . . . The limited scope of the fair cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury, . . . a basic truth that the Court of Appeals itself acknowledged for many years prior to its decision in the instant case. . . . We remain convinced that an extension of the fair cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension.

476 U.S. at 173-174 (citations omitted).

Petitioner offers a disarmingly simple explanation for why such an extension must now be adopted. He says that if it is constitutionally imperative for the pool of eligible jurors to include all distinct and cognizable groups within the community, it can only be because the requirement is intended to have some impact on the composition of the petit jury; and that it follows from this that any practice, at any stage of the selection process, which may reduce the possibility of having the petit jury reflect the demographic makeup of the community bears a burden of justification under the fair cross-section principle.

The argument for extension of the cross-section requirement is, as this Court said in *McCree*, unsound. As discussed in Part I.A, there is a constitutionally significant difference between the process of establishing a jury pool and selecting a venire to provide jurors for all cases, and the process of selecting a petit jury from that venire to try an individual case. The cross-section requirement reflects the belief that no class of citizens may be considered *a priori* unfit for jury service in *any* case solely on the basis of group affiliation, but its theoretical underpinnings do not logically extend to justify restricting a litigant's use of peremptory challenges to select impartial jurors in a *particular* case. Part I.B addresses the point that, while subject to the limited restrictions mandated by the Equal Protection Clause as construed in *Batson*, the peremptory challenge nevertheless continues to play an important role in the ability of both sides to choose fair and impartial jurors, and its salutary effect on the administration of criminal justice would be lost, for both sides, if petitioner's position is adopted.

Furthermore, extension of the cross-section requirement would be, as this Court also said in *McCree*, unworkable. As discussed in Part I.C, the impracticality of applying the cross-section principle at the petit jury stage is demon-

strated by the fact that the standard proposed by petitioner is fundamentally different from the standard proposed by *amicus* The Lawyers' Committee for Civil Rights Under Law (*amicus* The NAACP Legal Defense and Education Fund, Inc., proposes no standard), and both differ significantly from the standards used by the States and the federal circuits which have taken this approach; and by the fact that none of these standards promotes cross-sectional values in a practical and principled way.

A. The Rationale Underlying The Cross-Section Principle Does Not Provide Justification For Restricting The Use Of Peremptory Challenges.

There are four steps involved in the process of selecting a jury to try a case: establishing a pool of persons eligible to serve as jurors in all cases; drawing venires from the pool to obtain the number of prospective jurors needed for all cases pending at a given time; voir dire examination of the venire to determine which jurors should be dismissed from a particular case for cause; and the exercise of peremptory challenges by both parties. In the first two steps, the selection criteria are necessarily general, since the proper function of those stages is only to cull those who are unfit to serve in any case, and those who should be granted an exemption for valid public policy reasons. By contrast, the focus of the third and fourth stages is on the ability of jurors to fairly and impartially serve in an individual case.

Prior to the decision in *Taylor*, a number of this Court's cases acknowledged the importance of broad-based community involvement in the grand and petit jury system, as contributing to its fairness and its appearance of fairness. Selection methods which entirely excluded whole groups from the pool of eligible jurors, or routinely resulted in radical underrepresentation of distinctive groups

on the venires from which jurors were chosen, had been reviewed under the principles of equal protection, *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972); *Carter v. Jury Comm'n*, 396 U.S. 320, 331-332 (1970); *Brown v. Allen*, 344 U.S. 443, 470-471 (1953); *Smith v. Texas*, 311 U.S. 128, 129-130 (1940); *Strauder v. West Virginia*, 100 U.S. 303, 305-306 (1880), due process, *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (plurality opinion); *Fay v. New York*, 332 U.S. 261, 289 (1947), and, in some cases, this Court invoked its supervisory authority over the lower federal courts, *Ballard v. United States*, 329 U.S. 187, 193 (1946); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225 (1946); *Glasser v. United States*, 315 U.S. 60, 87 (1942). All of these cases involved selection criteria being applied at the pool or venire stage, and from them emerged the cross-section principle announced in *Taylor*: "that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." 419 U.S. at 528. There is no question that the pool and the venire from which petitioner's jury was selected were drawn in compliance with this command.[1]

Duncan v. Louisiana, 391 U.S. 145 (1968) provided the springboard for the jump made in *Taylor* from what had largely been an equal protection analysis to one grounded in the Sixth Amendment. *Duncan* held that the right to trial by jury was to be applied against the States through the Due Process Clause of the Fourteenth Amendment.

[1] At the time of petitioner's trial, the source list for the pool of eligible jurors was the list of registered voters, *Ill. Rev. Stat.* 1977, ch. 78, §1, and venires were drawn at random from the pool. §8. Qualifications for service were minimal, but there were a number of occupational exemptions. §§2, 4. In 1981, the source list was augmented by adding the list of valid driver's license holders, *Ill. Rev. Stat.* 1981, ch. 78, §§1-1a, and in 1987, automatic exemptions were almost completely eliminated. *Ill. Rev. Stat.* 1986 Supp., ch. 78, §4.

Id. at 149. The explanation in *Duncan* of the function of a jury was relied on in *Taylor* to incorporate the cross-section principle into the jury trial right:

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the common-sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional and perhaps overconditioned or biased response of a judge. *Duncan v. Louisiana*, 391 U.S., at 155-156. This prophylactic vehicle is not provided if the jury pool is made up only of special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

419 U.S. at 530. Still, the holding was limited: the Court emphasized that "we impose no requirement that petit juries actually chosen mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, . . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 538 (citation omitted). This has been a feature of the cross-section principle since its genesis. While holding that the disqualification of blacks from jury service in all cases violated equal protection, *Strauder*, 100 U.S. at 308, the Court at the same time recognized that there is no constitutional right to the inclusion of blacks on the jury in any individual case, *Virginia v. Rives*, 100 U.S. 313, 320-322

(1880), and it has never retreated from that holding. *Batson*, 476 U.S. at 85, n. 6. Even now, petitioner does not contend that the cross-section principle can be read to require proportional representation, or indeed any representation, of any distinctive group on the petit jury chosen to try a particular case.

The cross-section principle also played a role in the cases dealing with jury size and unanimity. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court held that the tradition of a jury of 12 was based more on historical accident than on any significant quality associated with that number for purposes of the right to a jury trial, and that juries of six did not offend the Sixth Amendment. *Id.* at 100-103. In response to the argument that the reduced size of the jury would result in a corresponding reduction in the opportunity to achieve cross-sectional representation, the Court said:

> . . . while in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible. Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, see, *e.g.*, *Carter v. Jury Commission*, 396 U.S. 320, 329-330 (1970), the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.

Id. at 102. Subsequently, in *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court found that, although the process of constitutional line-drawing in cases regarding jury size is somewhat artificial, *id.* at 231-232, the line had to be

drawn at six; a jury of five was held unconstitutional. Petitioner says the Court reached this result "because [a jury of five] decreases the opportunity for meaningful and appropriate representation of a cross section of the community" (Pet. Br. at 11-12), but that is only partially accurate. This Court actually enumerated five separate concerns which led to its holding, and the concern for cross-sectional representation ranked fourth. *Id.* at 232-239. Other concerns included the negative effect on the dynamics of group deliberation, a greater risk of inaccurate results, and large disparities in the results in close cases. *Id.* A verdict by a non-unanimous six-person jury was held to violate the Sixth Amendment for the same reasons in *Burch v. Louisiana*, 441 U.S. 130, 138 (1979), but in *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion), the Court upheld a statute permitting the return of non-unanimous verdicts from 12-person juries, and expressly rejected the contention that it led to nullification of minority viewpoints in violation of the cross-section requirement. *Id.* at 412-414. *See also*, *id.* at 378-380 (Powell, J., concurring in the judgment).[2]

In each of this Court's decisions dealing with the cross-section principle, a systemic aspect of the jury trial, affecting all cases, has been involved. In *Taylor* and the cases that led up to it, it was the way in which jury pools were defined and jury venires drawn, and in *Williams*, *Apodaca*, and *Ballew*, it was the format of the petit jury system. Throughout these decisions, the Court has always been careful to avoid having its opinions construed to im-

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[2] *Apodaca* involved a statute authorizing a verdict by a vote of 10 to two. 406 U.S. at 406. On the same day, the Court upheld a statute permitting a verdict by a vote of nine to three in *Johnson v. Louisiana*, 406 U.S. 356 (1972), but no argument was raised in that case concerning the impact on the cross-section requirement.

pute any extension of the cross-section requirement to the composition of the petit jury actually chosen to try an individual case. *Taylor*, 419 U.S. at 538; *Apodaca*, 406 U.S. at 413; *Fay*, 332 U.S. at 284; *Thiel*, 328 U.S. at 220.[3]

Nevertheless, the California Supreme Court held in *People v. Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978), that the cross-section principle is violated by the use of peremptory challenges in an individual case to excuse any members of a cognizable group on the basis of a supposed bias common to members of the group, and although the holding was grounded in the state constitution, the court relied largely on the decisions of this Court discussed above to support the result reached. 538 P.2d at 754-757. Since then, five other states[4] and two federal

[3] In *McCray v. Abrams*, 750 F.2d 1113 (2nd Cir. 1984), *vacated*, 106 S.Ct. 3289 (1986), the court posited that the decisions in the jury size and unanimity cases, and in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), authorized "constitutional scrutiny" of the steps involved in selecting a petit jury from the venire in a specific case. 750 F.2d at 1129. This reading of *Ballew* and *Apodaca* is unwarranted, because neither case involved scrutiny of the composition of a particular petit jury, they involved scrutiny of the structure of the jury system. While *Witherspoon* did involve the composition of the petit jury, it did not rest on the loss of a distinctive community group through the cause excusal of death-scrupled jurors, it rested on the loss of impartiality in a jury so composed. 391 U.S. at 518. No one disputes that the composition of a single jury may be examined to determine whether it is impartial, *see, e.g., Irvin v. Dowd*, 366 U.S. 717 (1961), but the impartiality of the jury in this case is not in question. Moreover, it would be difficult to square the Second Circuit's view of *Witherspoon* with this Court's statement in *McCree* that "[w]e have *never* invoked the fair cross-section principle to invalidate the use of either *for-cause* or peremptory challenges to prospective jurors. . ." 476 U.S. at 173 (emphasis added).

[4] *Fields v. People*, 732 P.2d 1145 (Colo. 1987); *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150 (1986); *Riley v. State*, 496 A.2d 997 (Del. 1985), *cert. denied*, 106 S.Ct. 3339 (1986); *State v. Neil*, 457 So.2d 481 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 481, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).

circuits[5] have adopted the rationale of *Wheeler*. Many more state courts[6] and federal circuits[7] have rejected this approach.

Petitioner's argument is based on *McCray* and *Booker*, which in turn are based on *Wheeler*. It is that extension of the cross-section requirement to the petit jury follows necessarily from what was said in *Taylor* about the function of the requirement and its relation to the function of the jury. He says that the requirement that jury pools and venires be representative would be pointless if it were not intended to have some impact on the composition of the petit jury, and would be nullified if the peremptory challenge could be used to accomplish in an individual case what would be impermissible at the pool and venire selection stages. (Pet. Br. at 10-11) He also argues that the function of the jury is the interposition of the commonsense judgment of the community between the government and the accused, and that this function could not be performed if any distinctive group could be excluded

[5] *McCray, supra*; *Roman v. Abrams*, 822 F.2d 214 (2nd Cir. 1987); *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *vacated*, 106 S.Ct. 3289 (1986), *opinion reinstated*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 910 (1987).

[6] *See, e.g., Nevius v. State*, 699 P.2d 1053 (Nev. 1985); *State v. Wiley*, 144 Ariz. 525, 698 P.2d 1244 (1985); *State v. Ucero*, 450 A.2d 809 (R.I. 1982); *State v. Sims*, 639 S.W.2d 105 (Mo. App. 1982); *Commonwealth v. Henderson*, 438 A.2d 951 (Pa. 1981); *Blackwell v. State*, 248 Ga. 138, 281 S.E.2d 599 (1981); *Mallot v. State*, 608 P.2d 737 (Ala. 1980); *State v. Grady*, 93 Wis.2d 1, 286 N.W.2d 607 (1979); *State v. Stewart*, 225 Kan. 410, 591 P.2d 166 (1979).

[7] *United States v. Leslie*, 783 F.2d 541 (5th Cir. 1986) (en banc), *vacated*, 107 S.Ct. 708 (1987), *opinion following remand*, 816 F.2d 1006 (5th Cir. 1987); *Willis v. Zant*, 720 F.2d 1212 (11th Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984); *United States v. Childress*, 715 F.2d 1313 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984); *United States v. Whitfield*, 715 F.2d 145 (4th Cir. 1983); *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984).

from the petit jury. (Pet. Br. at 12-13) Finally, he says that the legitimacy of the judicial system suffers in the eyes of the community when the jury that decides a case lacks the appearance of a body representative of the community. (Pet. Br. at 14) The first part of this argument ignores the significant difference between the process of selecting pools or venires and the process of selecting a petit jury, and misinterprets the relevant decisions of this Court. The second and third parts are indistinguishable from the contention that affirmative steps should be taken to have each petit jury actually mirror the diversity of the community.

The equal protection cases which led up to *Taylor* make clear that the exclusion of distinctive groups from eligibility for jury service in any case is discriminatory and pernicious in ways that the use of peremptory challenges in an individual case is not. Disqualifying the members of a group from jury service in all cases acts as "a brand upon them, affixed by the law, an assertion of their inferiority", *Strauder*, 100 U.S. at 308, while the use of peremptory challenges indicates no more than the belief of a litigant in a particular case involving particular issues that the challenged jurors are likely to have a bias with respect to those issues. *A priori* disqualification based on group affiliation also creates the impression that the jury, as an institution, is "the organ of [a] special group or class", *Glasser*, 315 U.S. at 86, while individuals of any group are subject to peremptory challenges in any case. To say that competence for jury service in general "is an individual rather than a group or class matter", *Thiel*, 328 U.S. at 220, is not the same as saying that group identity bears absolutely no relation to the ability of jurors to fairly and impartially decide the issues in a particular case. Furthermore, the contention that if *Taylor* is not extended it will be rendered a nullity, and the jury will

cease to operate as the intended buffer between the government and the accused, is overstated. The requirement that jury pools be representative and venires be selected at random means that the prosecutor cannot know prior to the decision to charge an offense what the composition of the venire will be, and cannot count on having enough peremptory challenges to exclude members of groups deemed partial as well as those individuals with more palpable biases. Thus, the requirement that the pool and venire be cross-sectional discourages "the corrupt or overzealous prosecutor" from bringing "unfounded criminal charges." *Duncan*, 391 U.S. at 156.

Respondents are in complete agreement with petitioner's statement that the "prophylactic purpose [of the jury] is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. . ." (Pet. Br. at 13) However, petitioner makes the leap from this proposition to the following one, in the same sentence: ". . . neither can [the prophylactic purpose] be served if a distinctive group is excluded from the petit jury *by peremptory challenge*." (Pet. Br. at 13) (emphasis added). Nowhere does he explain why the exercise of the peremptory challenge is the operative occurrence which negates the proper functioning of the jury. It is entirely possible that a distinctive group could be excluded from the petit jury because the random draw of a venire produced an aberrant underrepresentation of the group, and because those members who were called were properly excused for cause. Nor does petitioner explain why a multi-racial, multi-ethnic jury of six men and six women from which all Catholics have been peremptorily excused cannot possibly operate as the Sixth Amendment intended it to in a case with no religious overtones at all, while an all-white, all-male, socioeconomically homogenous jury selected without the

use of any peremptory challenges in a case fraught with racial tensions and involving a black female defendant can. The argument that peremptory excusal at the petit jury stage has the same effect on the function of the jury as systematic exclusion from the pool or the venire is an argument that affirmative steps have to be taken to produce cross-sectional juries.

The parallel argument, that peremptory excusal of a group in an individual case results in public perception of unfairness to the same extent as systematic exclusion from the pool or the venire (Pet. Br. at 14), is defective for the same reasons. It is doubtful that public concern would be expressed over the composition of the jury in the first case described above, but not the second. *A priori* exclusion of any distinctive group, such as that involved in *Taylor*, casts a cloud over the entire system, but on a case-by-case basis, perceptions turn not only on who is included on the jury but on who the other participants in the case are. However, the rule of *Batson* protects the integrity of the individual case by prohibiting the use of peremptory challenges to exclude members of a cognizable racial group to which the defendant belongs solely because of the shared characteristic.

The argument that any procedure which may conflict with the opportunity provided by the process of the random draw to achieve cross-sectional representation violates the Sixth Amendment (Pet. Br. at 11-12), is untenable. *Ballew, supra*, is cited in support of this argument, but *Ballew* does not stand for that proposition. *Ballew* teaches that jury size has consequences for the function the jury is intended to perform, and there is a point below which the impairment to that function takes on constitutional significance. "This line-drawing process, 'although essential, cannot be wholly satisfactory, for it requires attaching consequences to events which, when they lie very

near the line, actually differ very little.' " *Burch*, 441 U.S. at 138, quoting *Duncan*, 391 U.S. at 161. Everything said in *Ballew* about the impact of the five-person jury on the opportunity for cross-sectional representation might just as easily apply to a reduction from 12 to six, because it is obvious that a six-person jury presents much less of an opportunity for cross-sectional representation than a jury of 12, but the six-person jury was approved in *Williams*. Also, a non-unanimous 12-person jury may reduce the force of those minority voices which are present on the petit jury, to the detriment of cross-sectional values, but that does not make it unconstitutional. *Apodaca, supra*. Thus, *Williams* and *Apodaca* suggest that cross-sectional values, while important, are not always paramount. It is therefore necessary to examine the importance to the jury system of the peremptory challenge, and the impact petitioner's proposed extension would have on it.

B. Extension Of The Cross-Section Requirement Would Destroy The Value Of The Peremptory Challenge And Seriously Undermine The Ability Of Both Sides To Select A Fair And Impartial Jury.

The discussion which follows proceeds from two assumptions about the cross-section principle: that if it is extended to the petit jury selection stage, the considerations which define what a cognizable group is would be the same as those used when the jury pool or venire is examined; and that it would operate to restrict a defendant's use of peremptory challenges as well as the prosecution's.

The first assumption has not been uniformly accepted by the courts that have endorsed the extension argument. *Taylor* cautions that what groups can be considered cognizable may fluctuate depending on time and place, 419 U.S. at 537, and in *Duren v. Missouri*, 439 U.S. 357

(1979), the Court said that a group is cognizable if its members are sufficiently numerous within the community and distinct from other well-defined groups. *Id.* at 364. These are questions of fact, *Hernandez v. Texas*, 347 U.S. 475, 478 (1954), the resolution of which may require an extensive evidentiary hearing. *See, e.g., Willis v. Zant*, 720 F.2d at 1216-17. However, the courts applying the cross-section requirement at the petit jury selection stage have generally treated cognizability as a question of law, and have arbitrarily limited those groups considered cognizable. *See Fields*, 732 P.2d at 1153-54, n.15, and *Soares*, 387 N.E.2d at 515-516 and n.n. 29, 33 (cognizability defined only by race, gender, religion, and national origin); *Riley*, 496 A.2d at 1012 (limited to race); *McCray*, 750 F.2d at 1131, and *Neil*, 457 So.2d at 487 (race the only defining characteristic discussed, and no subsequent authority dealing with groups other than racial groups.)[8] No valid reason is given for why this should be so.

The second assumption has been accepted by four of the eight jurisdictions that apply the cross-section principle to petit jury selection. *Booker*, 775 F.2d at 772; *Neil*, 457 So.2d at 487; *Soares*, 387 N.E.2d at 517, n.35; *Wheeler*, 583 P.2d at 765, n.29.[9] If such an extension, and the attendant restrictions on the use of peremptory challenges, is necessary to insure a jury which is fair and gives the

[8] It is questionable whether Florida can be characterized as a state applying cross-section principles to petit jury selection. In *Kibler v. State*, 501 So.2d 76 (Fla. App. 1987), it was held that white defendants lack standing to object to the peremptory excusal of blacks, and this makes the Florida rule more closely resemble one based on equal protection rather than Sixth Amendment principles.

[9] In the other jurisdictions, the question of restricting a defendant's challenges was either not discussed (*McCray*; *Riley*), or not resolved (*Fields*, 732 P.2d at 1156, n.19; *Gilmore*, 511 A.2d at 1163, n.6).

appearance of fairness, then the restrictions must apply to all. *Booker*, 775 F.2d at 772. "Society also has a right to a fair trial." *Fay*, 332 U.S. at 288.

As did the State in *Batson*, respondents concede that the Constitution does not guarantee a right to peremptory challenges, and that *Swain v. Alabama*, 380 U.S. 202 (1965) recognized that their use is subject to the strictures of the Equal Protection Clause. However, the argument that restrictions on their use "will eviscerate the fair trial values served by the peremptory challenge", which was rejected in *Batson*, 476 U.S. at 98, carries considerably more force here then it did in the equal protection context. *Batson* carefully limited the opportunity to raise objections to the use of peremptory challenges to those situations in which the excluded group is "a cognizable racial group" of which the defendant is also a member. 476 U.S. at 96. Under a cross-section analysis, there is no requirement that the defendant be a member of the excluded group, nor must the excluded group be "a cognizable racial group." The types of groups that might be considered cognizable for cross-section purposes is potentially limitless, depending only on sufficient numbers and distinctiveness in a given place at a given time, and may include groups defined by age, *see* Annot., 62 ALR 4th 859 (1988), or by economic, social, political, or occupational status, religious affiliation, or geographic location, *see Thiel*, 328 U.S. at 220, as well as groups defined by race, gender, or national origin. *McCree*, 476 U.S. at 175. Thus, extension of the cross-section requirement would limit the peremptory challenge to an infinitely greater degree than does the Equal Protection Clause, and it would limit the defendant as well as the prosecution. Indeed, it would prohibit the use of peremptory challenges by either side for all but frivolous reasons or the most palpable manifestations of individual bias.

The history of the peremptory challenge, and its contribution to the overall fairness of the jury system was recounted at length in *Swain*, 380 U.S. at 212-221, and despite the limited restrictions imposed on its use in *Batson*, this Court continues to recognize that "the peremptory challenge occupies an important position in our trial procedures. . ." 476 U.S. at 98. It allows for the elimination of extremes of partiality at both ends of the spectrum, and insures a jury each of whose members is considered by both parties to be most able to render a fair and just verdict. When group membership correlates with partiality for purposes of the issues involved in a particular case, members of that group will be clustered at one end of the spectrum of partiality and the peremptory challenges used by one side or the other are likely to be directed to some degree at that group. In such a case, rigid adherence to the principle of cross-sectionalism disserves the core guarantee of the Sixth Amendment—an impartial jury—while the peremptory challenge promotes it. Thus, restricting the use of peremptory challenges in the name of cross-sectionalism destroys the value of the challenge and seriously impairs the ability of both sides to select an impartial jury.

C. Extension Of The Cross-Section Requirement Is Unworkable Because No Principled And Practical Standard Has Been Proposed.

In *McCree, supra*, this Court said that "an extension of the fair cross-section requirement to petit juries would be unworkable and unsound. . ." 476 U.S. at 174. Nevertheless, petitioner argues that *Duren, supra*, a case decided seven years before *McCree*, supplies a standard which can be adapted for purposes of applying the cross-section requirement to petit juries. However, the standard proposed by petitioner is inconsistent with the standard proposed by *amicus* The Lawyers' Committee For

Civil Rights Under Law; both are inconsistent with the standard adopted in *Wheeler*; and none of these standards provides a principled and practical approach.

Petitioner proposes that a prima facie violation of the Sixth Amendment can be established by showing that:

> 1) the group alleged to be excluded is a distinctive group in the community;
>
> 2) representation of this group on the petit jury is not fair and reasonable in relation to the number of such persons in the community; and
>
> 3) the underrepresentation is attributable to the prosecutor's use of his peremptory challenges.

(Pet. Br. at 15) This is, almost verbatim, the standard established in *Duren*, the only differences being the substitution of "the petit jury" for "venires from which juries are selected" in the second prong, and "the prosecutor's use of his peremptory challenges" for "systematic exclusion of the group in the jury-selection process" in the third. *See* 439 U.S. at 364.

The failure of this standard to provide a coherent and internally consistent guide for purposes of examining petit jury composition stems from its retention of the proportionality component of the *Duren* standard. At issue in *Duren* was a statute allowing women to opt out of jury service if they did not wish to be called, a practice which resulted in jury venires averaging less than 15% female in the county where Duren was tried, even though women constituted more than 50% of the population of the county. To make out a prima facie case, it was necessary to establish that women were not proportionately represented on venires over a period of time, thus showing systematic exclusion. In other words, the proportionality component of the *Duren* standard is inextricabiy bound up with the need to show that the exclusion was "systematic", *i.e.*,

"inherent in the particular jury-selection process utilized", *id.* at 366, rather than the result of a random draw that produced an aberrant venire in an individual case. Extending the cross-section requirement to the petit jury necessarily entails dropping the requirement that the exclusion be "systematic", but retaining the proportionality element in that context leads to absurd results.

First, it is clear from the standard proposed by petitioner that no objection to the use of peremptory challenges can be raised until the selection of the jury is complete, because it is only then that the second prong of his standard—"representation of [a] group on the petit jury is not fair and reasonable in relation to the number of such persons in the community"—can be evaluated. One cannot know if a group is underrepresented on the petit jury until the composition of the petit jury is known. Second, if the purpose of extending the cross-section requirement is to eliminate the use of any peremptory challenges against members of a cognizable group solely on the basis of group membership rather than on an individualized indication of bias, *see Booker*, 775 F.2d at 771; *McCray*, 750 F.2d at 1131; *Soares*, 387 N.E.2d at 515; *Wheeler*, 583 P.2d at 760-761, then petitioner's standard clearly does not serve that purpose. If the members of a distinctive group make up 20% of the general population of the community, and two members of the group are included on the petit jury, then the group is not underrepresented, and the second prong of the standard cannot be established. Thus, no prima facie violation of the cross-section requirement could be shown, even if the group was overrepresented on the venire and the prosecutor, with ten peremptory challenges, used all of them on other members of the group, freely admitting that group membership was the reason. This suggests one of two things, both of which are fatal to the extension argument. Either some, but not

all, group-based peremptory challenges are permissible, in which case the major premise of the extension argument as set forth in the cases which adopt it is false; or the real aim of petitioner's position is to acquire a right to a petit jury of a particular composition, consisting of a proportionate number of jurors who are members of one or more groups he deems partial to him, which cannot be abridged unless there is a compelling justification. This Court has repeatedly and expressly refused to confer such a right. *Batson*, 476 U.S. at 86, n. 6; *Taylor*, 419 U.S. at 538.

The standard proposed by *amicus* The Lawyers' Committee For Civil Rights Under Law differs from that proposed by petitioner in several significant respects, but is equally ill-suited to serve cross-sectionalism. It calls for comparison of the percentage of group members left on the venire after the prosecutor's peremptory challenges have been exercised with the percentage of the group in the general population, to determine whether there is reasonable proportionality. As with petitioner's focus on proportionality, this suggests that it is permissible, up to a point, to use peremptory challenges for group-based reasons. Moreover, it does not call for examination of the composition of the petit jury at any point, and considerable litigation could take place over a prosecutor's use of peremptory challenges to "exclude" a group which may actually have been substantially overrepresented on the petit jury finally selected in comparison to its numbers in the community. Also, it appears that *amicus* would recognize as "cognizable" only those groups defined by race (Br. for Lawyers' Committee at 12-14), while petitioner's proposed standard contains no such limitation.

The standards proposed by petitioner and *amicus* The Lawyers' Committee not only differ from each other, both differ substantially from the standard adopted in *Wheeler*

and used in the other jurisdictions purportedly applying cross-section principles to the petit jury selection stage. Under *Wheeler*, a prima facie case of a violation of the cross-section requirement has two components, beyond making a record as to the group identity of the venirepersons: a party must show "that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule"; and "from the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." 583 P.2d at 764. Although this standard avoids the pitfall of including a proportionality element, it creates other mischief. In *People v. Snow*, 44 Cal.3d 216, 242 Cal. Rptr. 477, 746 P.2d 452 (1987), the defendant, a black man, was tried by a 12-person jury which included two blacks. There is no indication as to how many blacks were on the venire or how large a group they were in the community, but it was shown that the prosecutor used six of the 16 alloted peremptory challenges to excuse blacks. Because the prosecutor had not satisfactorily explained his use of peremptory challenges, the California Supreme Court found that a violation of the cross-section requirement had been shown, and it reversed the conviction. 746 P.2d at 456-458. The court held that the excusal of any members of a cognizable group violates *Wheeler*, whether or not the jury contains other members of that group, and even if the group is represented on the jury in direct proportion to its numbers in the community. 746 P.2d at 457.

As applied in *Snow*, the *Wheeler* standard is indistinguishable from the equal protection analysis employed in *Batson*. This lends support to the observation of Judge Ripple, concurring in the judgment below, that in the time between *Swain* and *Batson* "the sixth amendment analysis was, I respectfully suggest, simply an elliptical way for

the lower courts to avoid the precedential effect of *Swain*." (J.A. at 37)

The problem of formulating a standard for implementing an extension of the cross-section requirement to the petit jury selection stage is that no standard remains true to cross-section principles. The premise that is essential to the courts that have adopted the extension argument is that peremptory challenges may never be used to exclude members of a distinct group based solely on group affiliation. If proportionality is made an element of the standard, then the premise is proven false because the standard does nothing to remedy even blatantly group-based challenges once minimum proportional representation is achieved. However, if proportionality is irrelevant, then a remedy exists for a single group-based challenge, even if the jury finally chosen is a perfect mirror of the community, and the remedy is reversal of the conviction in the name of cross-sectionalism. Thus, extension of the cross-section requirement to the petit jury is theoretically unsound and practically unworkable, and the judgment of the Court of Appeals should be affirmed.

II.

FOR PURPOSES OF THE RETROACTIVITY DOCTRINE, THE DATE OF THE ANNOUNCEMENT OF A NEW RULE OF CONSTITUTIONAL LAW IS THE ONLY APPROPRIATE WATERSHED, AND THE RULE OF *BATSON v. KENTUCKY* SHOULD NOT BE APPLIED RETROACTIVELY TO CASES IN WHICH THE CONVICTION BECAME FINAL PRIOR TO THE DATE OF THE DECISION.

In its relatively brief history, the retroactivity doctrine has been a subject of considerable debate among the members of this Court, and it has recently undergone considerable change. However, at least since *Linkletter v. Walker*, 381 U.S. 618 (1965), two aspects of this doctrine

have remained constant, and have never been questioned. The first is that when giving retroactive effect to a new rule of constitutional law, the date of the announcement of the rule is the watershed event, and not some event occurring prior to the rendition of judgment. The second is that what Justice Harlan called the Blackstonian theory—"that the law should be taken to have always been what it is said to mean at a later time", *Mackey v. United States*, 401 U.S. 667, 677 (1971) (Harlan, J., dissenting)—is not viable. It is these principles which petitioner calls into question in this case.

A. The Denial Of Certiorari In *McCray v. New York* Neither Foreshadowed The Decision In *Batson v. Kentucky* Nor Destroyed The Precedential Effect Of *Swain v. Alabama*.

This Court denied certiorari in *McCray v. New York*, 461 U.S. 961 (1983) on May 31, 1983, four months before petitioner's conviction became final upon the completion of direct review. McCray sought relief on grounds that the prosecutor in his case used peremptory challenges to exclude all blacks and Hispanics from the jury, alleging violations of equal protection and the Sixth Amendment. *See McCray v. New York*, 51 U.S.L.W. 3740 (U.S. April 12, 1983) (No. 82-1381). Justice Stevens, joined by Justices Blackmun and Powell, filed an opinion respecting the denial of certiorari, noting the importance of the issues raised, but expressing a preference "to allow the States to serve as laboratories in which the issue receives further study before it is addressed by this Court." 471 U.S. at 963. Justice Marshall, joined by Justice Brennan, dissented from the denial of certiorari.

Three years later, this Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986), and it subsequently held that the rule of *Batson* was to be given retroactive effect to all cases pending on direct review "when *Batson* was decided", *Griffith v. Kentucky*, 107 S.Ct. 708, 710 (1987), but not

to "convictions that became final before our decision [in *Batson*] was announced." *Allen v. Hardy*, 106 S.Ct. 2878, 2880 (1986) (per curiam). Petitioner's conviction became final before the decision in *Batson* was announced, but he says that retroactive application in accord with *Griffith* should be extended to cases like his, pending on direct review when certiorari was denied in *McCray*. He argues that the observations of three Justices regarding the importance of the issues presented by McCray's petition, coupled with the dissenting opinions of two Justices, indicated that a majority of this Court was interested in reexamining *Swain v. Alabama*, 380 U.S. 202 (1965), and that this had the effect of destroying the precedential force of *Swain*. (Pet. Br. at 23-26)

The contention that *Swain* was made a dead letter by the opinions accompanying the denial of certiorari in *McCray* is wrong for several reasons. The opinion of Justice Stevens notes that two state courts had scrutinized the use of peremptory challenges in individual cases by relying on Sixth Amendment principles, 461 U.S. at 962, n.*, and encourages "the various *States*", *id.* at 963 (emphasis added), to serve as laboratories. This suggests an interest not in reexamining the equal protection holding of *Swain*, but in the analysis of Sixth Amendment principles developed after *Swain*. Because of its reference to "the various States", the opinion does not imply that the lower federal courts should be free to reinterpret the Equal Protection Clause.

Similarly, the dissent in *McCray* focuses on Sixth Amendment principles, and although critical of *Swain*, does not perforce advocate overturning it. The dissent takes the view that the developments in Sixth Amendment jurisprudence after *Swain* provide a different constitutional basis for reaching a different result. 461 U.S. at 965-970. Moreover, all of the state courts that departed from *Swain*

did so on the basis of jury trial provisions in their state constitutions, and they referred to state equal protection guarantees only to define cognizable groups. Even the two federal circuits that accepted the invitation to serve as laboratories reaffirmed the continued vitality of *Swain* as the prevailing equal protection doctrine. *Booker v. Jabe*, 775 F.2d 762, 767 (6th Cir. 1985), *vacated*, 106 S.Ct. 3289, *opinion reinstated* 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 910 (1987); *McCray v. Abrams*, 750 F.2d 1113, 1123-24 (2nd Cir. 1984), *vacated*, 106 S.Ct. 3289 (1986). Petitioner says that after the denial of certiorari in *McCray*, no lawyer worthy of the name could rely with confidence on the continued vitality of *Swain*. (Pet. Br. at 25) In fact, between *McCray* and *Batson*, not even the courts that were most critical of *Swain* believed that it was not the dominant equal protection precedent.

The question of retroactivity arises only when a decision represents a significant departure from prior precedent. *Batson* was "an explicit and substantial break with prior precedent", *Allen*, 106 S.Ct. at 2880, overruling the key portion of *Swain*. To accept the proposition that such a momentous event as this Court overruling one of its prior decisions was so clearly foretold in the nonbinding opinions expressed on the denial of certiorari three years earlier is to make a greater precedent of *McCray* than *Batson*. For purposes of the retroactivity doctrine, the announcement of a new rule of constitutional law by this Court must always be considered the main event.

Petitioner also makes a separate argument that retroactive application of *Batson* to cases in which the conviction became final prior to the decision, but after the denial certiorari in *McCray*, is not inconsistent with *Allen*. (Pet. Br. at 26-29) *Griffith* and *Allen* divide the cases into two categories for purposes of *Batson* retroactivity: cases in which the conviction became final either before or after

the decision. Petitioner appears to be saying that a third category should be created, consisting of cases in which the conviction became final in the time between *McCray* and *Batson*, and that, without disturbing either *Griffith* or *Allen*, retroactivity for this third category may be separately considered. He then invokes the three-part *Linkletter* analysis. This argument is confusing, because it suggests that while *McCray* did not destroy the precedential effect of *Swain*, thereby making the proposed third category entitled to the benefit of *Batson* through *Griffith*, *McCray* should still be given some significance for retroactivity purposes. Petitioner does not say why. Moreover, *Allen* applied the *Linkletter* test and found that, for cases in which the conviction became final prior to *Batson*, retroactive application was unwarranted. Petitioner presents no reason why the *Linkletter* analysis should yield a different result depending on how long before *Batson* the conviction became final.

B. Retroactive Application Of *Batson* To Cases In Which The Conviction Became Final Prior To The Decision Is Unwarranted, Regardless Of Whether The Harlan Approach Or The Three-Part *Linkletter* Test Is Applied.

In his now famous dissents in *Mackey v. United States*, 401 U.S. 667 (1971) and *Desist v. United States*, 394 U.S. 244 (1969), Justice Harlan was critical of the approach to the question of retroactivity taken by the Court in *Linkletter*, and further developed in *Stovall v. Denno*, 388 U.S. 293 (1967). Under *Linkletter* and *Stovall*, the question of whether a new rule of constitutional law was to be given retroactive effect was answered on a case-by-case basis, by looking to the purpose of the new rule, the extent of reliance on the old standard, and the impact retroactive application would have on the administration of justice. *Stovall*, 388 U.S. at 297. In Justice Harlan's view, this led to *ad hoc* and inconsistent decisions, and deviated from

the correct model of judicial review. He advocated a dichotomy between direct and collateral review, whereby a new rule of law announced on direct review would apply to all similarly situated cases, but, with two narrow exceptions, would not apply to cases on collateral review at the time of the decision. Application of the new rule to cases where the conviction had previously become final was unjustifiable, according to Justice Harlan, because the proper function of collateral review was limited to testing the validity of the judgment under the standards prevailing at the time of the conviction, and because the interests of finality and comity weighed against expanding the role of habeas corpus. *Mackey*, 401 U.S. at 681-693 (Harlan, J., dissenting): *Desist*, 394 U.S. at 260-269 (Harlan, J., dissenting).

The first part of Justice Harlan's analysis, requiring new rules to be applied to all non-final cases, gained acceptance gradually. It was applied only to Fourth Amendment cases in *United States v. Johnson*, 457 U.S. 537 (1982), then to Fifth Amendment cases in *Shea v. Louisiana*, 450 U.S. 51 (1985), and finally to all cases in *Griffith*. The Court has yet to state whether it will adopt the second part of the Harlan approach, *see Yates v. Aiken*, 108 S.Ct. 534, 537 (1988), and there remains much resistance to it. *See Griffith*, 107 S.Ct. at 717-719 (White, J., dissenting); *Shea*, 470 U.S. at 61-67 (White, J., dissenting); *Johnson*, 457 U.S. at 564-568 (White, J., dissenting).

Citing the dissenting opinions in *Shea* and *Johnson*, petitioner argues that there should be no distinction for retroactivity purposes between direct and collateral review, and that all new constitutional rules should always be fully retroactive. (Pet. Br. at 30-32) The dissents in *Shea* and *Johnson*, and in *Griffith*, do not support that view. They advocate adherence to the *Stovall* test, and as this Court held in *Allen*, *Batson* is not retroactive under the *Stovall*

test to cases like petitioner's where the conviction became final prior to the decision. Not since before *Linkletter* has the view now propounded by petitioner been a part of the retroactivity debate.

One of the exceptions to the rule of non-retroactivity for cases on collateral review discussed by Justice Harlan concerned the establishment of procedures that must be said to be " 'implicit in the concept of ordered liberty.' " *Mackey*, 401 U.S. at 693 (Harlan, J., dissenting), quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). In their brief (at 16-18), *amicus* The Lawyers' Committee For Civil Rights Under Law invokes this exception, arguing that racial discrimination is inimical to democratic principles, and particularly so when it occurs within the judicial system.

It is clear from the context that the phrase quoted in Justice Harlan's opinion was used in *Palko* to describe those portions of the Bill of Rights which should be incorporated through the Fourteenth Amendment to apply against the States. *See* U.S. at 323-325. It is equally clear that when Justice Harlan invoked that phrase, he did not intend for it to mean precisely the same thing it meant to Justice Cardozo when he wrote it. Otherwise, Justice Harlan's view would have been that all new rules established on Fourth, Fifth, or Sixth Amendment grounds would be fully retroactive, and that is not the case. Justice Harlan cited *Gideon v. Wainwright*, 372 U.S. 335 (1963) as an example of a new rule that would fit within this exception. *Gideon* held that the States were bound to observe the Sixth Amendment's guarantee of counsel for the accused, because it is essential to the fairness of the trial and the ability of the accused to have his side of the case heard. *Id.* at 343-345. If the rule of *Batson* was essential to the fairness of a jury trial, such that without it the defendant's opportunity to present his case would

be meaningless, then it would have been retroactive under *Stovall*, because it would have been essential to the accuracy of the fact-finding process. However, this Court said in *Allen* that while *Batson* may serve to enhance accuracy, the rule it establishes is not one that " 'goes to the heart of the truthfinding function.' " *Allen*, 106 S.Ct. at 2880, quoting *Solem v. Stumes*, 465 U.S. 638, 645 (1984).

Whether analyzed under the *Stovall* test or under the views on retroactivity articulated by Justice Harlan, retroactive application of *Batson* to review of convictions, like petitioner's, that became final before the decision is not warranted. The judgment of the Court of Appeals should therefore be affirmed.

III.

PROCEDURAL DEFAULT BARS CONSIDERATION OF PETITIONER'S THIRD ARGUMENT; AND, IN AN INDIVIDUAL CASE, THE PEREMPTORY EXCUSAL OF JURORS WHO ARE MEMBERS OF A COGNIZABLE RACIAL GROUP TO WHICH THE DEFENDANT ALSO BELONGS, IN THE BELIEF THAT SUCH JURORS WILL BE SYMPATHETIC TO THE DEFENDANT BECAUSE OF THE SHARED GROUP CHARACTERISTIC, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE AS CONSTRUED IN *SWAIN v. ALABAMA*.

In his third argument, petitioner contends that a violation of the Equal Protection Clause as construed in *Swain v. Alabama*, 380 U.S. 202 (1965) may be established in an individual case if the prosecutor volunteers explanations for his exercise of peremptory challenges, and the explanations are proven to be a pretext. Consideration of this claim is barred by procedural default, because petitioner did not raise it in the Illinois Appellate Court, and that court expressed no view on this interpretation of *Swain*.

Moreover, on the merits, petitioner's argument is based on a misinterpretation of *Swain*. Petitioner fails to distinguish between the situation where the prosecutor states that his excusal of jurors belonging to a cognizable racial group is based on his belief that such persons are ununqualified to serve as jurors in any case, and the situation where the reason is that such persons are likely to be partial to the defendant in a particular case because the defendant is also a member of the group. In the first situation, the evidentiary burden imposed in *Swain* is satisfied by the prosecutor's admission, but *Swain* does not prohibit the use of peremptory challenges based on group affiliation if the prosecutor believes group affiliation is related to the outcome of the trial.

A. The Argument That The Equal Protection Clause As Construed In *Swain* Can Be Violated By The Use Of Peremptory Challenges In An Individual Case Was Not Raised In Or Decided By The Illinois Appellate Court.

The failure to raise a claim on direct appeal constitutes a procedural default which bars habeas corpus review to the same extent as the failure to object at trial. *Murray v. Carrier*, 106 S.Ct. 2639, 2648 (1986). When his case was before the Illinois Appellate Court, petitioner argued that the manner in which the prosecutor exercised peremptory challenges deprived him of a fair trial and an impartial jury under the Sixth and Fourteenth Amendments, and under the Illinois Constitution, and that the court should adopt the rationale of *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979) and *People v. Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978) and apply cross-section principles. His only reference to *Swain* was to distinguish its analytical framework from the one he intended to invoke. (Appellant's Br. at 73-83; Appellant's reply Br. at 7) No effort was made to persuade the court to read *Swain* in a certain way,

and to find an impermissible use of peremptory challenges under the equal protection analysis of *Swain*. In its ruling, the court reviewed the facts, *People v. Teague*, 108 Ill. App. 3d 891, 439 N.E.2d 1066, 1069-70 (1st Dist. 1982), *cert. denied*, 464 U.S. 867 (1983), discussed the cross-section cases on which petitioner relied, 439 N.E.2d at 1070, and declined to follow that approach. 439 N.E.2d at 1070-71. Accordingly, the Court of Appeals found that any argument based on *Swain* had been procedurally defaulted. (J.A. 17, n.6)

Petitioner admits that his present argument was not presented to the state appellate court, but he says that the court resolved the issue as though he had raised it. (Pet. Br. at 39) The applicability of *Swain* when the prosecutor volunteers an explanation for his challenges is an issue that has split the circuits. *Compare Weathersby v. Morris*, 708 F.2d 1493, 1496 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984) (applying *Swain*) with *United States v. Newman*, 549 F.2d 240, 249 (2nd Cir. 1977) (holding *Swain* inapplicable). It is extravagent to assert that the appellate court's mere citation of *Swain*, followed by a statement of what is usually understood to be its holding, *see* 439 N.E.2d at 1070, constitutes a resolution of a question concerning the proper interpretation of *Swain* that was not even posed. Petitioner says that the appellate court rejected his claim because it found *Swain* dispositive. (Pet. Br. at 39) In fact, it did not. It found dispositive of the issue presented its own decision in an earlier case, and the decisions of the other jurisdictions, rejecting the application of cross-section principles to petit jury selection procedures. Petitioner's third argument is therefore barred by procedural default.

Petitioner also argues that, although he did not raise his claim concerning the proper construction of *Swain* in state court, respondents may not rely on procedural de-

fault as a defense to that claim because they did not urge it below. (Pet. Br. at 38) The habeas corpus petition filed in the district court alleged that the circumstances of the case gave rise to a violation of petitioner's Sixth and Fourteenth Amendment rights (R. 1, pp. 4-5), and the accompanying brief presented only one argument, seeking adoption of the cross-section analysis. Respondents' memorandum in support of their motion for summary judgment addressed the impropriety of adopting petitioner's cross-section argument, and further asserted that no equal protection violation could be shown under *Swain* because the record contained no evidence outside the facts of petitioner's case. (R. 14) In his cross-motion, petitioner responded to the arguments against adopting a cross-section analysis, and in one paragraph, cited *Weathersby* as demonstrating "[a]nother method by which this Court can find that petitioner has demonstrated that his constitutional rights have been violated. . ." (R. 20, p. 5) The Equal Protection Clause was not mentioned. Respondents, in reply, distinguished *Weathersby* on its facts. (R. 22, p. 4) On appeal, petitioner continued to rely on a cross-section analysis. The question of whether an equal protection claim had been procedurally defaulted was addressed in supplemental memoranda filed by the parties, after *Batson v. Kentucky*, 476 U.S. 79 (1986) was decided.

Petitioner cites *Granberry v. Greer*, 107 S.Ct. 1671 (1987), which holds that the failure to raise the defense of exhaustion in a timely fashion may or may not preclude reliance on it at a later stage of the proceedings, depending on how the interests of comity and federalism would be best served. Respondents did not fail to raise procedural default in a timely fashion. Petitioner expressly disavowed reliance on equal protection in state court, did not raise it in his petition or his opening brief, and referred to it only obliquely in his cross-motion. The only

point during the habeas proceedings at which petitioner clearly declared his intent to rely on equal protection as a basis for relief independent of his cross-section argument was after the decision in *Batson*. Respondents then promptly answered that procedural default barred the claim, and the Court of Appeals agreed. Thus, respondents' present procedural default argument has been properly preserved. *Cf.*, *Engle v. Isaac*, 456 U.S. 107, 124, n. 26 (1982).

B. The Peremptory Excusal Of Jurors Who Are Members Of A Cognizable Racial Group To Which The Defendant Also Belongs, In The Belief That They Will Be Partial To The Defendant, Is Permitted By *Swain*.

The predominant view of *Swain* is that it permits the prosecutor to take the race of prospective jurors into account when exercising peremptory challenges, and to excuse those who are the same race as the defendant in the belief that they are likely to be partial to him. *United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984); *United States v. Thompson*, 730 F.2d 82, 85 (8th Cir.), *cert. denied*, 469 U.S. 1024 (1984); *United States v. Newman*, 549 F.2d 240, 249 (2nd Cir. 1977); *Cunningham v. Estelle*, 536 F.2d 82, 84 (5th Cir. 1976); *United States v. Carter*, 528 F.2d 844, 850 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976). Two courts have taken a contrary view, stating that such use of peremptory challenges is improper even under *Swain*, and that constitutional error may be shown on the record of an individual case if the prosecutor volunteers an explanation which is determined to be pretextual. *Garrett v. Morris*, 815 F.2d 509, 511 (8th Cir.), *cert. denied*, 108 S.Ct. 233 (1987); *Weathersby v. Morris*, 708 F.2d 1493, 1496 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984).

In part II of its opinion in *Swain*, this Court expressly recognized that peremptory challenges are

> . . . frequently exercised on grounds normally thought irrelevant to judicial proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, *which may include their group affiliations*, in the context of the case to be tried.

380 U.S. at 220-221 (footnotes omitted) (emphasis added). Knowing that this was the practice, the Court did not disapprove of it. It stated that "[w]ith these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." *Id.* at 221.

In part III of its opinion, the Court distinguished the approved practice from a situation that might give rise to an equal protection violation

> We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged. But when the prosecutor in a county, *in case after case*, whatever the circumstances, whatever the crime *and whoever the defendant or the victim may be*, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. . . . In these circumstances, *giving even the widest leeway to the operation of irrational but trial-related*

> *suspicions and antagonisms*, it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries *for reasons wholly unrelated to the outcome of the particular case on trial* and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to faciliate or justify.

Id. at 223-224 (citation omitted) (emphasis added). What the Court disapproved of in part III of the opinion was the peremptory excusal of blacks in all cases in the belief that blacks are unqualified to serve in all cases, and it distinguished this from the practice it sanctioned, namely, the peremptory excusal of blacks in cases where, because of who the defendant or the victim was, the presence of blacks on the jury was believed to bear a relation to the outcome, even if a court might consider the belief irrational. Even the dissent did not question the analysis in part II of the majority opinion. The position of the dissent was that the petitioner had satisfied the burden discussed in part III:

> The holding called for by this case, is that where as here, a Negro defendant proves that Negroes constitute a substantial segment of the population, that Negroes are qualified to serve as jurors, and that none or only a token number has served on juries *over an extended period of time*, a prima facie case of the exclusion of Negroes from juries is then made out. . .

Id. at 244-245 (Goldberg, J., dissenting).

Nothing said in *Batson* puts a different gloss on *Swain*. The majority opinion notes that the lower courts, "following the teaching of *Swain*", 476 U.S. at 92, have read it to require proof of repeated peremptory excusal of members of a group in case after case over a period of time, but the Court did not say that this was an incorrect view of the holding in *Swain*. It said "we reject this evidentiary formulation as inconsistent with standards *that have been developed since Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.* at 93. Similarly, the footnote in Justice White's concurring opinion, *see* 476 U.S. at 101, n.* (*White*, J., concurring), indicates only that a prosecutor's statement that he believed blacks to be unqualified to serve as jurors in any case would be enough to satisfy the evidentiary burden outlined in part III of the *Swain* opinion. Nothing in this observation detracts from the statement in part II of the *Swain* opinion that it is permissible to take race or other group affiliation of prospective jurors into account when exercising peremptory challenges if group affiliation is believed to bear a relationship to the jurors' perception of the case on trial.

The prosecutor in this case did not say that he was peremptorily excusing blacks because he believed them to be unqualified as jurors in any case. The stated reasons were that some jurors "were of very young years" and that "a balance of an equal number of men and women" was desired. (J.A. 3) Petitioner presents an elaborate argument in an effort to show that the stated reasons were not the real reasons (Pet. Br. at 18-21), and he infers from this that the real reason was that the challenged jurors, like him, were black. Even assuming this to be the case, *Swain* permitted peremptory challenges to be exercised for such reasons, and that is the crucial difference between *Swain* and *Batson*. *Batson* did not merely alter the evidentiary burden outlined in part III of the *Swain* opinion, it overruled the premise which was the foundation

of part II of the opinion, *i.e.*, that it is permissible to presume that black jurors will be sympathetic to black defendants and to exercise peremptory challenges on that basis. *Swain* therefore provides no basis for finding a violation of equal protection on the record in this case, and the judgment of the Court of Appeals should be affirmed.

CONCLUSION

For all the foregoing reasons, respondents respectfully request that the judgment of the United States Court of Appeals be affirmed.

Respectfully submitted,

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Dated: July 1, 1988

REPLY

BRIEF

No. 87-5259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, Director, Department of Corrections, and MICHAEL O'LEARY, Warden, Stateville Correctional Center,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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ARGUMENT

I. THE PROSECUTION'S USE OF THE PEREMPTORY CHALLENGE TO DEFEAT THE POSSIBILITY THAT THE PETIT JURY WILL REPRESENT A FAIR CROSS SECTION OF THE COMMUNITY VIOLATES THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY.

A. No Constitutionally Significant Difference Exists Between Selection Of Jurors For Jury Pools And Venires And Selection Of Jurors For The Petit Jury.

Respondents contend a constitutionally significant difference exists between the process of establishing a jury pool and selecting a venire to provide jurors for all cases, and the process of selecting a petit jury from the venire to try an individual case, such that *a priori* disqualification of jurors based on group affiliation is intolerable in the former instances but acceptable in the latter. The focus at the pool and venire stages being on the fitness of jurors to serve in any case, whereas the focus at the petit jury stage being on the ability of the jurors to be fair in the individual case, the peremptory challenge of jurors based on their membership in a cognizable group is permissible in Respondents' view whenever group membership correlates with partiality for purposes of the issues involved in an individual case. From their perspective, the *a priori* exclusion of black citizens from the jury pool or venire would violate the Sixth Amendment fair cross-section requirement, but challenge of black citizens peremptorily based on their race would not, because the peremptory challenge evidences the prosecutor's judgment that the excluded black jurors are unable to fairly and impartially decide the issues in a particular case.

There is no distinction of substance between an *a priori* disqualification of jurors based on their race for purposes of selection of the jury pool or venire, which Respondents

agree is to be condemned, and the peremptory challenge of jurors from a petit jury based on their race. Both exclusions are equally reprehensible because in each instance an *a priori* judgment is being made as to the worthiness of the jurors as a class, separate and apart from their individual ability and fitness to serve. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946).

The stated legal underpinnning for Respondents' argument is the "equal protection cases which led up to *Taylor* [which] make clear that the exclusion of distinctive groups from eligibility for jury service in any case is discriminatory and pernicious in ways that the use of peremptory challenges in an individual case is not." (Resp. Br. 20) Even were this interpretation of the Equal Protection Clause correct,[1] Respondents' argument is misfocused. The claim at issue is founded in the Sixth Amendment, not the Fourteenth.

An equal protection challenge is concerned with discriminatory purpose, whereas a fair cross-section challenge is concerned with the disproportionate exclusion of a distinctive group. *Duren* v. *Missouri*, 439 U.S. 357, 368 n. 26 (1979). Whether a brand of inferiority has been affixed on jurors who are peremptorily challenged due to their race is a separate question from whether a defendant has been denied his right to a fair possibility of a cross-sectional jury. If it is determined that a cognizable group

[1] Respondents do not identify their source for this distinction but their assumption that the Equal Protection Clause would not be offended by the peremptory challenge of black jurors based on the judgment their race renders them unable to be fair in an individual case is contrary to *Batson* v. *Kentucky*, 476 U.S. 79, 97 (1986), which interprets the clause to forbid challenge of "black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black."

has been disproportionately excluded from a jury, the State can justify this infringement of the Sixth Amendment by showing attainment of a fair cross section to be incompatible with a significant state interest. *Taylor* v. *Louisiana*, 419 U.S. 522, 533-535 (1975). Proof of a fair cross-section violation requires no demonstration of discriminatory intent and the State's explanation for its exclusion of a cognizable group does not defeat the demonstration of a prima facie fair cross-section violation, but merely justifies the failure to achieve a fair community cross section if it qualifies as a significant state interest.[2]

No inconsistency exists between exclusion of jurors on the basis of race by peremptory challenge and the constitutional concept of a jury trial, according to Respondents. A jury from which the prosecutor has removed all black jurors by peremptory challenge will serve its prophylactic purpose because in making his charging decision a prosecutor will not know that he will in fact try his case before an all-white jury. (Resp. Br. 21) The threat of a fair and impartial jury will not deter a prosecutor in the many instances where he can be reasonably assured in advance that his peremptory challenges are sufficient in number to bar a minority from the jury.

The theoretical right to trial by jury from which a cognizable group has not been affirmatively excluded would not afford the accused the full protection intended

[2] Respondents overstate the weight of authority supporting their arguments. (Resp. Br. 19 n.6 and 7) The cases they cite decline to find use of the peremptory challenge to exclude a minority violated the Sixth Amendment or their state constitutions because of a belief that *Swain* v. *Alabama*, 380 U.S. 202 (1965) presented a fundamental obstacle to any successful attack on the peremptory challenge in a single case.

by the Sixth Amendment guarantee. The right to trial by jury is intended to be a safeguard against the compliant, biased or eccentric judge, as well as against the corrupt or overzealous prosecutor. *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). The removal of a distinctive group by peremptory challenge dilutes the quality of community judgment on the jury, interfering with the ability of the jury to perform this function, *Taylor*, 419 U.S. at 535, as well as converting the jury into an organ of a special group or class. *Glasser* v. *United States*, 315 U.S. 60 (1941).

Respondents believe that public concern for the integrity of the criminal justice system is no greater where the prosecution exercises its challenges so as to exclude black jurors from an individual jury, than where an all-white jury is selected as a result of random draw. Surely, there is a difference in the public's perception between an all-white jury selected purely by chance and against the prevailing odds and an all-white jury achieved because a governmental official in a very public forum has eliminated prospective jurors because of the color of their skin. In the former instance, a neutral formula has been employed to achieve that unexpected result; in the latter, a race-conscious formula is used to achieve a deliberate perversion.[3]

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[3] It is not sufficient that the rule of *Batson* prevents exclusion of jurors based on race where the defendant is himself a member of the excluded group (Resp. Br. 22), because there are instances where the prosecutor may seek exclusion of a group from a jury due to his perception that that group will disfavor his case although defendant is not himself a member of the excluded group. (Pet. Br. 9) Respondents also incorrectly assume that the exclusion of black jurors has relevance only for issues involving race, an assumption rejected in *Peters* v. *Kiff*, 407 U.S. 493, 503 (1972).

Respondents fail to recognize that acceptance of these same arguments would result in rejection of the principle that exclusion of a cognizable group from the jury pool or venire violates the Sixth Amendment. The process of random draw and selection may result in an all-white venire from which a petit jury is selected. However, it is only where this discrepancy occurs consistently, rather than occasionally, that a fair cross-section violation is demonstrated because only then is it apparent the cause of the underrepresentation is inherent in the particular jury selection process utilized. *Duren*, 439 U.S. at 366. The Sixth Amendment countenances that an unrepresentative jury may result from the process of random selection but does not tolerate unrepresentativeness caused by a perversion of that process. Where perversion occurs, whether by operation of a statutory exemption from the jury pool or the exercise of the peremptory challenge, the jury is not the embodiment of the democratic ideal and the Sixth Amendment is violated. The impossibility of the achievement of a truly representative jury in every instance does not excuse the systematic and intentional exclusion of a cognizable group from a jury. *Thiel*, 328 U.S. at 220.

In neither the petit jury nor the venire context does the Sixth Amendment require that any affirmative step be taken to ensure that the petit jury or the venire in each instance mirrors the community. Petitioner contends only that it bars any affirmative action which interferes with the representative character of the jury resulting from the process of random selection.

B. Inconsistency Exists Between The Goal Of Selection Of Fair And Impartial Jurors And The Restriction Of Use Of The Peremptory Challenge To Exclude A Cognizable Group.

Respondents concede that the peremptory challenge is not constitutionally guaranteed but contend that recogni-

tion that the fair cross-section requirement limits the use of the peremptory challenge would, even more than the rule of *Batson*, disserve the core guarantee of the Sixth Amendment—an impartial jury—that unfettered use of the peremptory challenge would promote, because the Sixth Amendment would limit both defense as well as prosecution challenges[4] and potentially apply to a "limitless" number of cognizable groups. (Resp. Br. 23-26).

The fundamental defect in Respondents' argument is their failure to recognize that if it were established in a particular case that members of a cognizable group were actually partial and could not be fair, or that a reasonable basis existed to fear their partiality, a significant state interest would exist which would justify elimination of the group from the jury. The Sixth Amendment would not interfere with "elimination of extremes of partiality at both ends of the spectrum," (Resp. Br. 26) but would prevent removal of members of a distinctive group on the basis of *a priori*, irrational group-based judgments about their partiality. The fair cross-section requirement guarantees, rather than interferes with, achievement of an impartial jury. Respondents do not claim that the basis for the exclusion of the black jurors in this case was other than their common racial identity or that denial of their right to challenge those excluded jurors would have interfered with their ability to select a fair jury in this case.

Second, the specter raised by Respondents of a potentially limitless number of cognizable groups existing at

[4] Whether the Sixth Amendment provides authority to restrict the defense use of the peremptory challenge is an open question but defense abuse of the challenge may be prohibited in the interest of maintaining the balance of the scales between the defense and prosecution. *Hayes* v. *Missouri*, 120 U.S. 681 (1887).

any one time and place is an exaggeration. Every identifiable group is not cognizable for fair cross-section purposes. The concept of distinctiveness is linked to the purposes of the fair cross-section requirement such that exclusion of the group from jury service must contravene those purposes. *Lockhart* v. *McCree*, 476 U.S. 162, 174, 175 (1986). To establish cognizability courts have required a showing of: (1) the presence of some quality which defines and limits the group; (2) cohesiveness of attitudes, ideas or experiences which distinguish the group from the general social milieu; and (3) a community of interest among the members of the group which may not be represented by other segments of society. *United States* v. *Test*, 550 F.2d 577, 591 (10th Cir. 1976). The size of the group is another factor considered. *Taylor*, 419 U.S. at 530. Blacks, women and Mexican-Americans appear to be cognizable groups. *Lockhart*, 766 U.S. at 175.[5]

A juror's group membership would pose no obstacle to his removal if the group of which he is a member did not share such unique and distinctive attitudes or experiences such that those perspectives could not be provided by members of a different group. The appearance of unfairness the fair cross-section requirement is designed to protect against would not be created unless there were a basis to believe the juror had been removed due to his

[5] Courts have declined to find cognizable: young adults, *Barber* v. *Ponte*, 772 F.2d 982 (1st Cir. 1985), *cert. denied*, 475 U.S. 1050, NRA members, *United States* v. *Salamone*, 800 F.2d 1216 (3rd Cir. 1986), blue collar workers and the less educated, *Anaya* v. *Hanson*, 781 F.2d 1 (1st Cir. 1986), persons who choose not to register to vote, *United States* v. *Afflerbach* 754 F.2d 866 (10th Cir. 1985), *cert. denied*, 472 U.S. 1029, and those with lower incomes, recent residents and non-homeowners. *Sands* v. *Cunningham*, 617 F.Supp. 1551 (D.C.N.H. 1985).

group identity rather than individual ability to serve. Given the assimilating and mobile character of American society, it is extremely unlikely that every group defined by ethnicity, religious affiliation, economic or social status, in each and every community at every time and place, would qualify as distinctive, to the extent that removal of a member of that group would deny the defendant the benefit of the common-sense judgment of the community.

Respondents' Brief creates the erroneous impression that cross-sectional values have limited importance, suggesting the fair cross-section requirement may not be paramount to the State's interest in unfettered use of its peremptory challenges. This impression results from Respondents' mistaken analysis of *Williams* v. *Florida*, 399 U.S. 78 (1970) and *Ballew* v. *Georgia*, 435 U.S. 223 (1978), which held a six-person but not a five-person jury constitutionally permissible. (Resp. Br. 22, 23) Respondents contend the line drawn between five and six-person juries was largely arbitrary in that negative impact on the opportunity for a cross-sectional jury is just as great where a jury is reduced in size from twelve to six, as when a jury is reduced from twelve to five. (Resp. Br. 23) Also, the concern that a five-person jury would result in a decreased opportunity for a representative jury ranked only fourth among five factors which convinced the Court in *Ballew* to hold the five-person jury constitutionally inadequate. (Resp. Br. 17)

This Court articulated but did not rank the concerns which determined its conclusion in *Ballew*. Because the concerns expressed by the Court are interrelated it would be impossible to assign a specific weight to each factor. For instance, if the size of a jury interferes with the opportunity for representation of minority groups, the absence of minority groups will also have an impact on the

ability of the jury to engage in effective group deliberation because the biases and prejudices of the jurors would not be counterbalanced by minority viewpoint. *Ballew*, 435 U.S. at 232, 233. Moreover, in *Williams* the six-person jury was not perceived as a threat to minority participation so long as arbitrary exclusion of cognizable groups was impermissible. *Williams*, 399 U.S. at 102. In *Ballew*, the Court learned from studies brought to its attention in the interim that if a minority constituted 10% of the community, 53.1% of randomly selected six-person juries would have no minority representation while 89% would not have two. *Ballew*, 435 U.S. at 237.

Thus, the conclusion reached in *Williams* that there were only negligible differences in twelve and six-person juries was proven incorrect and persuaded the Court to permit no further reduction in jury size. More importantly, the decrease in minority representation resulting from six-person juries was tolerated only because minorities would be unrepresented due to the process of random selection rather than arbitrary exclusion. Where a minority group is excluded by peremptory challenge, the exclusion of the group is not purposeless but deliberate and eliminates any possibility of minority representation.

C. Petitioner's Proposed Standard For Determining Whether The Fair Cross-Section Requirement Has Been Violated Is Consistent With The *Duren* Standard And Does Not Defeat The Purpose Of The Requirement.

Respondents argue that Petitioner's proposed standard for determining whether a fair cross-section violation has occurred is neither principled nor practical. Their primary objection is that it retains the proportionality component of *Duren* while requiring no showing that the disproportionality occurred over a period of time.

Respondents contend that retention of the proportionality requirement in the petit jury context leads to absurd results. (Resp. Br. 27, 28)

The underrepresentation of a cognizable group being the conceptual benchmark for the fair cross-section requirement, *Duren*, 438 U.S. at 364, it would be absurd to abandon the proporationality requirement of *Duren* in any fair cross-section analysis. It is difficult to conceive how one might prove unconstitutional underrepresentation of a cognizable group without some comparison of the percentage of a cognizable group in the community with the percentage of the group represented on the relevant component of the jury.

No inconsistency results from retention of the proprotionality requirement where no demonstration is required that the disproportionality occur over a period of time. The third prong of the prima facie case articulated in *Duren* is that the underrepresentation be due to the systematic exclusion of the group in the jury-selection process, i.e., that it be inherent in the particular jury selection process utilized. *Duren*, 439 U.S. at 366. Evidence that women were underrepresented on jury venires not just occasionally, but consistently over a period of time, furnished proof that the cause of the underrepresentation was the statutory exemption at issue rather than the random selection process. In the petit jury context the cause of the underrepresentation will be obvious. If it is the prosecution's exercise of its peremptory challenge, rather than the random selection process, which causes elimination of a cognizable group from the petit jury, proof of repeated misuse of the peremptory challenge in other cases would be superfluous. Only where the cause of the underrepresentation in a particular case is not apparent is it necessary to resort to proof of a consistent pattern of

disproportionality to demonstrate that the underrepresentation is attributable to the particular selection process utilized.

No absurdity results from retention of the proportionality requirement. Respondents contend the purpose of the fair cross-section requirement is to eliminate group-based peremptory challenges and retention of the proportionality requirement leads to the absurd result of permitting a prosecutor to engage in discriminatory jury selection practices once a group is fairly represented on the venire. (Resp. Br. 28, 31) The purpose of the fair cross-section requirement is not to eliminate discrimination but to provide the accused a jury chosen from a fair community cross section. *Duren*, 439 U.S. at 368. The test proposed by Petitioner should not be subject to criticism for only furthering cross-sectional values while failing to remedy an evil it was not intended to eliminate.[6]

Respondents' assert the proportionality requirement prevents any complaint from being made until the selection of the jury is complete. (Resp. Br. 28) Respondents assume that in every instance it will not be demonstrable until selection is complete that the prosecution is exercising its challenges so as to eliminate the possibility that the jury will reflect a fair community cross section. This premise may often be untrue because it may be apparent

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[6] To the extent that the fair cross-section requirement would prevent a prosecutor from exercising his peremptory challenges to defeat the possibility that the petit jury will reflect a cross-section of the community, it will also tend to eliminate discrimination in jury selection. Knowing that he cannot employ the peremptory challenge to eliminate a cognizable group from the jury, the prosecutor will be forced to make individualized judgments about members of that group in determining whether and which members of the group should be challenged.

during the process of selection that the final composition of the jury will be unrepresentative. More importantly, if Respondents' concern is waste of judicial resources, the remedy is not to eliminate the Sixth Amendment guarantee of a fair and impartial jury, but for the prosecution to refrain from misconduct which will necessitate selection of a jury anew.

II. RETROACTIVE APPLICATION OF THE RULE OF *BATSON* v. *KENTUCKY* SHOULD BE EXTENDED AT A MINIMUM TO THOSE DEFENDANTS WHOSE CONVICTIONS WERE NOT FINAL WHEN CERTIORARI WAS DENIED IN *McCRAY* v. *NEW YORK*.

A. After *McCray*, *Swain* Could Not Be Justifiably Relied On To Sanction A Prosecutor's Discriminatory Use Of The Peremptory Challenge.

Respondents complain that Petitioner has attributed undeserving weight to the denial of certiorari in *McCray* v. *New York*, 461 U.S. 961 (1983) because the opinion of Justice Stevens and the dissent suggest an interest, not in reexamining *Swain*, but in a Sixth Amendment analysis, and therefore did not imply that lower courts were free to reinterpret the Equal Protection Clause, as evidenced by lower courts' unanimous adherence to *Swain*. (Resp. Br. 33, 34)

Petitioner agrees that lower courts did not undertake to reexamine *Swain* in response to *McCray* but believes their reticence is attributable not to the lack of an invitation, but to the reluctance of any lower court to refuse to follow Supreme Court precedent which has not been expressly overruled. *Vail* v. *Board of Education*, 706 F.2d 1435, 1445 (7th Cir. 1983) (Eschbach, J., concurring). Courts naturally gravitated toward the Sixth Amendment analysis which did not have the defect of involving an inevitable collision with *Swain*, but nothing in the

opinions accompanying *McCray* directed lower courts solely toward the Sixth Amendment.

Although Respondents claim the dissenters did not advocate overturning *Swain*, Justice Marshall not only posited the Sixth Amendment would provide a vehicle for reexamining *Swain*, but noted the absurdity inherent in *Swain* of requiring that several suffer discrimination before any defendant could object and that *Swain* was inconsistent with other equal protection cases. *McCray*, 461 U.S. at 965 (Marshall, J., dissenting). Justice Stevens expressed his agreement with Justice Marshall's appraisal of the importance of the issue and did not direct litigants to any particular constitutional theory, but merely noted the current developments in the law.[7]

Petitioner does not argue that merely because a majority of the Justices indicated an interest in reexamining *Swain*, lower courts were free to disregard it. (Resp. Br. 33) Rather, it is the invitation extended to lower courts to serve as laboratories in which the procedural and substantive problems associated with judicial review of peremptory challenges receive further study before the Court would address the issue, that had the effect of destroying the precedential force of *Swain*. If lower courts were to experiment, to test solutions to the problems of discriminatory use of the peremptory challenge, *Swain* could no longer control and could not be relied on to dismiss a claim of discrimination in the exercise of the peremptory challenge.

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[7] Respondents imply that if any invitation existed to reexamine *Swain* it was extended only to state courts (Resp. Br. 33) but fail to explain why Justice Stevens would also note the absence of any conflicting decisions in the federal system as a reason to delay resolution of the issue. 461 U.S. at 962.

Petitioner is not suggesting that *McCray* is paramount to *Batson*, nor is that the issue. (Resp. Br. 34) The issue is whether a case on collateral review can be denied the retroactive benefit of a new rule based on the need for finality and allocation of limited resources, where a distinction is drawn between direct and collateral review on the assumption there is assurance the conviction was perfectly free from error when it become final, *Mackey* v. *United States*, 401 U.S. 667, 689-691 (1971) (Harlan, J., concurring and dissenting), where no such assurance exists because the "old rule" of *Swain* could no longer be relied on to tolerate discrimination.

A fundamental concern in retroactivity analysis is that similarly situated defendants be treated similarly. The unfairness in some defendants effectively receiving the retroactive benefits of *Batson* because their state courts accepted the challenge of *McCray* to provide a remedy for discriminatory peremptory challenge practices, while other similarly situated defendants did not due to their state courts' refusal to provide redress, is evident. The quality of justice an accused receives should not depend on so fortuitous a circumstance and demands that all those affected be provided the remedy of retroactive applicaton of *Batson*.

B. Petitioner's Argument That New Rules Should Be Given Complete Retroactive Effect Is Not Founded In Blackstonian Theory But In The Same Principles Which Persuade That Non-Final Cases Benefit From A New Rule.

Respondents do not address the merits of Petitioner's argument that the same considerations which persuaded this Court to extend the benefits of new rules to all cases not final when the rule is announced, persuade that retroactivity be extended to cases on collateral review. This

argument is made not in reliance on Blackstonian theory (Rep. Br. 32) but merely asks this Court to reexamine whether the concerns which led Justice Harlan to distinguish between cases on direct appeal and collateral review continue to provide a rationale for the distinction. Petitioner maintains those concerns are now adequately addressed by *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

III. *SWAIN* v. *ALABAMA* PERMITS A PROSECUTOR'S VOLUNTEERED EXPLANATION FOR HIS EXERCISE OF HIS PEREMPTORY CHALLENGES TO BE EXAMINED TO DETERMINE WHETHER THE EXPLANATION IS LEGITIMATE OR A MERE PRETEXT FOR RACIAL DISCRIMINATION.

A. *Swain* Did Not Hold The Assumption That Black Jurors Are Unable To Fairly Judge Black Defendants To Be An Acceptable Trial-Related Consideration Justifying Peremptory Challenge Of Black Jurors Consistent With The Fourteenth Amendment.

Respondents do not deny that an examination of the prosecutor's explanation for his exercise of all ten of his peremptory challenges against black jurors supports the conclusion that the explanation is a mere pretext for racial discrimination. They contend only that *Swain* v. *Alabama*, 380 U.S. 202 (1965) holds that "it is permissible to presume that black jurors will be sympathetic to black defendants and to exercise peremptory challenges on that basis." (Resp. Br. 46) Respondents' view is that *Swain* condemned only "the peremptory excusal of blacks in all cases in the belief that blacks are unqualified to serve in all cases." (Resp. Br. 44)

Swain insulated a prosecutor's challenges from review to preserve the peremptory nature of the challenge and created a presumption that the prosecutor acts on accept-

able trial-related considerations in exercising his challenges against black jurors. *Swain* did not, however, hold that an assumption that a black juror would be unable to fairly judge a black defendant was such an acceptable consideration. As Justice White observed in his concurring opinion in *Batson*:

> . . . *Swain* itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecutor had consistently excluded blacks from petit juries. *This should have warned prosecutors that using peremptories to exclude blacks on the assumption that no black could fairly judge a black defendant would violate the Equal Protection Clause.*

Batson, 476 U.S. at 101 (White, J., concurring) (emphasis added and footnote omitted). Justice White also observed that a prosecutor's belief that blacks could not fairly try a black defendant would be the equivalent of the view that all blacks should be eliminated from the entire venire. 476 U.S. at 101. While no presumption need be indulged that a prosecutor acted on permissible trial-related considerations in removing black jurors because he has volunteered his reasons for their removal, his express or implied acknowledgment that black jurors were challenged on the assumption they could not fairly try a black defendant is not acceptable under *Swain*.

B. The Illinois Appellate Court Held *Swain* Afforded Petitioner No Basis For Relief From His Conviction.

Respondents argue the Illinois appellate court did not reject Petitioner's claim because it found *Swain* dispositive but because "[i]t found dispositive of the issue presented its own decision in an earlier case, and the decisions of the other jurisdictions, rejecting the application of cross-section principles to petit jury selection procedures." (Resp. Br. 40)

Respondents ignore the appellate court's acknowledgement that while *Swain* holds it is "error to exclude a group as a group where it is shown the group has been systematically prevented from jury service or on particular juries . . . [n]o showing of any such systematic action, however, has been made here." *People* v. *Teague*, 108 Ill.App.3d 91, 439 N.E.2d 1066, 1070 (1st Dist. 1982) (citations omitted). The appellate court also interpreted *Swain* to be a bar to recognition of any cross-sectional claim:

> If, as *Payne*[8] holds, the State under the circumstances there posited has to show a basis for its peremptory challenges, then the peremptory challenge has been so effectively emasculated as to destroy its function which *Swain* and Illinois law has recognized.

Teague, 439 N.E.2d at 1070. Thus, the appellate court specifically found no *Swain*-based claim was demonstrated on the record before the court and that *Swain* prevented any interference with a prosecutor's unfettered use of the peremptory challenge in an individual case.

C. Petitioner's *Swain* Claim is Not Barred By Procedural Default Where Respondents Waived This Issue By Their Failure To Timely Raise It In The District Court And Court Of Appeals.

Respondents admit Petitioner filed a habeas corpus petition alleging violation of his Sixth and Fourteenth

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[8] *People* v. *Payne*, 106 Ill.App.3d 1034, 346 N.E.2d 1046 (1st Dist. 1982), *reversed*, 99 Ill.2d 135, 457 N.E.2d 1202 (1983), *cert. denied*, 461 U.S. 1028, which held the Sixth Amendment allowed a trial court to require a prosecutor to explain the reason for his challenge of black jurors if it appeared that the prosecutor acted on the basis of race.

Amendment rights and that *Weathersby* v. *Morris*, 708 F.2d 1493 (9th Cir. 1983) was cited to the district court as a basis for the award of relief to Petitioner, without objection from Respondents. (Resp. Br. 41) Respondents do not claim that Petitioner's equal protection claim is different from that recognized in *Weathersby* and do not explain why it is excused from failing to object to Petitioner's reliance on *Weathersby* in the district court on the ground of procedural default.

Respondents also neglect to reveal that in the court of appeals Petitioner again argued *Weathersby* afforded him a basis for relief and that since the prosecutor volunteered the reasons for his challenges, it need not be presumed he acted for acceptable reasons, but his motives for excusing the black jurors could be examined. Appellant's Brief, p. 25, 26. Respondents did not urge the court of appeals to hold this claim barred by procedural default, but responded to the argument on its merits. Appellee's Brief, pp. 13-15.

Respectfully submitted,

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